

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 397 OF 2015

- 1. TRANSTEL LTD}**
- 2. DIAMOND STARS LTD}.....PLAINTIFFS**

VERSUS

- 1. MAHI COMPUTERS & APPLIANCES LTD}**
- 2. PROPERTY SERVICES (U) LTD}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiffs brought this action against the Defendants jointly and severally for an order that the second Defendant immediately releases the Plaintiffs' goods in its custody, recovery of Uganda Shillings 11,050,000/= (Eleven Million Fifty Thousand only) and Uganda Shillings 152,297,575/= (One Hundred Fifty Two Million, Two Hundred Ninety Seven Thousand, Five Hundred Seventy Five Uganda shillings) being amounts outstanding as a result of the first Defendant failing to pay for goods supplied by the 1st Plaintiff and 2nd Plaintiff respectively.

The Plaintiff's grievance is that on 18th June, 2014 the first Plaintiff Company entered into an agreement with the first Defendant Company, wherein the first Defendant was to sell goods on the second Plaintiff's behalf as an agent. The first Plaintiff subsequently supplied the goods between 21st and 29th April, 2015 to the first Defendant. On 21st November, 2013 the second Plaintiff entered into an agreement with the first Defendant Company, wherein the first Defendant was to sell goods on behalf of the second Plaintiff. The second Plaintiff subsequently supplied the goods to the first Defendant between 1st January and 29th May, 2015. The first Defendant failed to furnish consideration for the goods supplied and owes the Plaintiffs the

stated amounts. The second Defendant who is the landlord of the first Defendant locked up the premises and denied the Plaintiffs access to the goods when the Plaintiffs notified them of their intention to recover the goods. The Plaintiffs have suffered great losses and inconveniences in their business as a result of the Defendants' actions and omissions and pray that court find them liable.

Efforts to serve the first Defendant were futile because they had closed shop as such on 23rd March, 2017, the Plaintiffs applied for and were granted leave to extract fresh summons and serve them upon the Defendants by way of substituted service. They were served on 27th March, 2017 and an affidavit of service thereto deposed on 28th March, 2017. The Plaintiffs applied for interlocutory judgment on 15th May, 2017 and interlocutory judgment was entered the same day.

The Plaintiffs were represented in the proceedings by Deepa Verma Jivram of Messrs Verma Jivram & Associates. The suit came for formal proof on 11th July, 2017 whereupon the Plaintiff's called two witnesses and also relied on the testimony of the two witnesses in writing. The court was thereafter addressed in written submissions on the following issues by the Plaintiff's Counsel:

1. Whether the 1st Defendant is in breach of the trading agreement with the 1st Plaintiff?
2. Whether the 1st Defendant is in breach of the agreement with the 2nd Plaintiff?
3. Whether the 2nd Defendant is liable for denying the Plaintiffs access to the goods?
4. Whether the 1st and 2nd Plaintiffs are entitled to the remedies sought?

Written Submissions of Counsel of the Plaintiffs:

1. Whether the 1st Defendant is in breach of the trading agreement with the 1st Plaintiff?

The Plaintiffs' Counsel relied on the holding in **Nakawa Trading Co. Ltd vs. Coffee Marketing Board [1994] 11 KALR 15** for what amounts to breach of contract which was defined to mean "...when one of the parties fails to fulfil his or her obligations imposed by the

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terms of the Contract". She submitted that PW1 (Amar Mukesh Thakrar) testified in paragraph 4 of his witness statement that between 21st and 29th April, 2015 the 1st Plaintiff supplied various goods to the 1st Defendant to sell as an agent on their behalf as evidenced in invoices totaling to the amount due marked exhibit "B". PW1 also testified in paragraph 5 of his witness statement that the first Defendant failed to pay the price for the same and owed the first Plaintiff Uganda Shillings 11,050,000/= marked exhibit "B". According to Clause "A" of the Trading terms and conditions exhibit "A", payment was supposed to be on raised invoices and no part payments were allowed. The 1st Defendant breached the trading agreement with the 1st Plaintiff by neglecting or failing to furnish consideration for the goods and as such Counsel prayed that court holds the 1st Defendant liable for breach of contract.

2. Whether the 1st Defendant is in breach of the agreement with the 2nd Plaintiff?

It is the 2nd Plaintiff's submission that the 1st Defendant breached the agreement with the 2nd Plaintiff dated 21st November, 2013. PW2 (Vishnu Morampudi) testified in paragraph 2 of his witness statement that the second Plaintiff entered in an agreement with the 1st Defendant on 21st November, 2013. This is evidenced by exhibit "AA" attached thereto which is an Account opening form with terms and conditions executed between the parties. PW2 further testified in paragraph 4 of his witness statement that the 2nd Plaintiff supplied the first Defendant with various goods to sell on their behalf. According to Clause 1 of exhibit "AA" the Account Opening form under terms and conditions, all invoices were payable within 30 days from the date of the invoice. PW2 testified in paragraph 5 of his witness statement that the 1st Defendant failed and or neglected to furnish the consideration for the goods and the amounts owed to Uganda Shillings 152,297,575/=-, exhibit "BB" is a copy of the ledger account showing the unpaid sums.

Furthermore, PW2 testified in paragraph 6 of his statement that the 1st Defendant issued cheques as part payment and all of them were dishonoured as evidenced in cheques attached and marked exhibit "CC". Breach of contract has been defined in the decision of **Nakawa Trading Co. Ltd vs. Coffee Marketing Board (supra)** to mean when one of the

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parties fails to fulfil his or her obligations imposed by the terms of the Contract. It is the 2nd Plaintiff's submission that the 1st Defendant's failure to furnish consideration for the goods amounting to Uganda Shillings 152,297,575/= constituted breach of contract and as such prayed that court finds the 1st Defendant liable.

3. Whether the 2nd Defendant is liable for denying the Plaintiffs access to the goods?

Counsel for the Plaintiff's submitted that the 2nd Defendant is liable for denying the Plaintiffs access to the goods, seizing and locking up the said premises. PW1 (Amar Mukesh Thakrar) testified in paragraph 3 of his statement that according to Clause "F" of the Agreement exhibit "A" the goods would in all cases be the property of the first Plaintiff until the 1st Defendant had fully paid the purchase price for the same. Similarly, PW2 (Vishnu) testified in paragraph 3 of his witness statement that according to Clause 3 of the Agreement, Exhibit "AA", the goods would in all cases be the property of the Second Plaintiff until the first Defendant had paid and completed the purchase price for the same. PW1 and PW2 in paragraphs 7 and 8 respectively, when the Plaintiffs notified the second Defendant who is the landlord of the first Defendant, of their intention to recover their goods from the first Defendant's premises/shop, situated at Plot 69, Kampala Road, the second Defendant seized the goods and locked up the said premises hence denying the second Plaintiff access to the said premises.

PW2 attached exhibit "EE" as the written notice to the 2nd Defendant that was duly received as it bears a stamp of the 2nd Defendant. The 2nd Defendant did not give any form of response to the said communication. The stated act of failure to respond to the demand notice to release the Plaintiffs' goods, seizing the goods and locking up the premises amounted to denial of the Plaintiffs' access to their goods for which the Plaintiff prayed for an order that the 2nd Defendant releases the Plaintiffs' goods.

4. Whether the 1st and 2nd Plaintiffs are entitled to the remedies sought?

The remedies sought by the Plaintiffs are:

- a) An order that the first Defendant pays the first Plaintiff Uganda Shillings 11,050,000/-

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(Uganda Shillings Eleven Million Fifty Thousand Shillings) being the amount owed to the first Plaintiff.

- b) An order that the first Defendant pays the second Plaintiff Uganda Shillings 152,297,575/- (One Hundred Fifty Two Million, Two Hundred Ninety Seven Thousand, Five Hundred Seventy Five Uganda shillings) being the amount owed to the first Plaintiff.

The position of the law under **Section 48 (2) of the Sale of Goods Act** is to the effect that where under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract. Furthermore, according to **Professor Atiyah, the Sale of Goods, 10th Ed Longman, London Pg. 301**, "it is the duty of the buyer to pay the price of the goods he has bought or agreed to buy".

PW1 and PW2 have testified in paragraphs 4 and 5 of their witness statements that the goods were supplied and the 1st Defendant failed to pay for the goods in accordance with the time frame of the agreements as evidenced under Clauses "A" of exhibit "A" and Clause 1 of exhibit "AA". The Plaintiffs therefore prayed for an order of payment of the sums due to the 1st Plaintiff vides Uganda Shillings 11,050,000 (Uganda Shillings Eleven Million Fifty Thousand Shillings) and the 2nd Plaintiff that is Uganda Shillings 152,297,575 (One Hundred Fifty Two Million, Two Hundred Ninety Seven Thousand, Five Hundred Seventy Five Uganda shillings).

- c) An order that the second Defendant releases the goods belonging to the Plaintiffs locked up at the first Defendant's premises.

According to Clause "F" of 1st the Plaintiff's Exhibit "A" and Clause 3 of the 2nd Plaintiff's Exhibit 3, the Plaintiffs retained property in the goods and title for the goods supplied to the 1st Defendant. According to PW1 and PW2 in paragraphs 7 and 8 respectively, the goods were seized and locked up by the 2nd Defendant yet all the title and property still remains with the Plaintiff. The Plaintiffs are entitled to an order that the 2nd Defendant releases the said goods on the basis that they retained title in the goods according to the Agreements.

d) General damages for inconvenience_

The Plaintiffs are entitled to general damages for inconveniences and losses caused on their respective businesses arising from the breach of the agreements. According to **Halsbury's laws of England fourth edition reissue volume 12 (1)** and paragraph 1063 thereof page 484, upon breach of the contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interests from the time when it became payable under the contract.

PW1 testified in court that clause I of the Exhibit "A" trading terms and conditions, states that all overdue amounts may become subject to monthly interest of 5% from the due date plus any collection/ legal charges may be incurred. PW1 stated that the principal amount of Uganda Shillings 11,050,000/= has been outstanding for a period of 26 months and the total amount on interest is Uganda Shillings 14,365,000/=. PW2 testified in court that clause 1 of the Exhibit "AA" the Account Opening form, states that "...failure/ delay of any payment after due date authorises Diamond Stars Limited to debit account with interest on overdue amounts...". PW2 then prayed to court that an interest of 2% per month is charged on the Defendants and also stated that the principal amount which is Uganda Shillings 152,297,575/= has been outstanding for a period of 26 months; therefore the total amount on interest is Uganda Shillings 79,194,739/=. The Plaintiffs are entitled to the said amounts as general damages arising from the two agreements and prayed that court awards the said amounts accordingly.

e) Aggravated damages;

It's the Plaintiffs' submission that they are entitled to aggravated damages arising from the conduct of the 1st and 2nd Defendant. In the case of **OBONGO vs. KISUMU Council [1971] EA 91, at page 96**; Spry, V.P. explained what constitute aggravated damages that if...it is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the Defendant and this injury suffered by the Plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. PW1 and PW2 testified in paragraphs 7 and 8 of their witness statements respectively,

that the second Defendant who is the landlord of the first Defendant, seized the goods and locked up the said premises denying the second Plaintiff access to the premises after discovering the Plaintiff's intention to recover their goods from the first Defendant's premises/shop, situated at Plot 69, Kampala Road.

PW1 and PW2 also testified in paragraphs 6 and 7 of their witness statements respectively; that when the Plaintiffs notified the first Defendant of their intention to sue for the outstanding amounts, the first Defendant hurriedly closed business and all its officials left the country. Such conduct by the Defendants only aggravated the loss and injury to the Plaintiffs business and thus it is on those grounds that the Plaintiffs prayed that an order of aggravated damages be made against the Defendants.

f) Interest on damages;_

According to **Section 26(2) of the Civil Procedure Act**, it is within the discretion of court to award interest at a rate that it deems fit. The principle upon which the Plaintiffs pray that this court should award interest is stated by Oder JSC in **Premchandra Shenoï & Anor v. Maximov Oleg Petrovich SCCA No. 9 of 2003** that "in considering what rate of interest the respondent should have been awarded in the instant case, I agree that the principle applied by this Court in **SIETCO vs. NOBLE BULDERS (U) Ltd (Supra)** to the effect that it is a matter of the Court's discretion is applicable. The basis of awards of interest is that the Defendant has taken and used the Plaintiff's money and benefited. Consequently, the Defendant ought to compensate the Plaintiff for the money". PW1 in paragraph 10(e) and PW2 in paragraph 11(e) of their witness statements prayed to court for interest to be awarded on damages and that they are entitled to interest on the same.

g) Costs of the suit.

Section 27 of the Civil Procedure Act provides that; Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what

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property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid. The Plaintiffs have incurred enormous costs in instituting and maintaining this suit against the Defendants and prayed that court orders costs of the suit be paid by the Defendant.

Judgment

I have carefully considered the written submissions of Counsel as well as the pleadings on the subject matter of the suit. This suit proceeded ex parte and it is material to consider the pleadings in the plaint.

It is averred that the first Plaintiffs claim against the Defendants jointly and severally is for an order for the second Defendant immediately to release the Plaintiff's goods in its custody, recovery of Uganda shillings 11,050,000/=, general damages, aggravated damages, interests and costs of the suit.

As far as the second Plaintiff is concerned, the claim against the Defendants jointly and severally is for an order that the second Defendant immediately releases the Plaintiff's goods in its custody and for recovery of Uganda shillings 152,297,575/= being the amount outstanding as a result of the first Defendant failing to pay for various goods supplied to them by the second Plaintiff, general damages, aggravated damages, interests and costs of the suit.

It is therefore clear that the claim of the Plaintiff is for a liquidated amount of money and for release of goods detained by the Defendants. The suit proceeded in default of the defence filed by the Defendant. The record shows that on the eighth of May 2017, the Plaintiff's Counsel applied to the court for default judgment on the ground that there was a substituted service upon the Defendants, and an affidavit of service of the summons was served in the newspapers. Accordingly the Plaintiff's Counsel applied for interlocutory judgment which was entered under Order 9 rule 8 of the Civil Procedure Rules on 11th July, 2017 by the Registrar. Thereafter the suit proceeded for formal proof.

As far as rules of procedure are concerned, the Plaintiff is entitled to the liquidated demand even though it has not applied for it under Order 9 rules 6 of the Civil Procedure Rules. Secondly the evidence adduced by the Plaintiffs witnesses PW1 and PW2 remained unchallenged on the issue of detention of goods. The detention of goods was proved as submitted by the Plaintiff's Counsel in the written submissions above. The only matter left for me to consider is whether general and aggravated damages should be awarded.

The law and rule of practice is that where there is a claim for a liquidated demand, judgment can be entered for the liquidated demand and the claim for pecuniary damages can be fixed for assessment of damages only. Here the Plaintiff seeks for an order for release of goods. There is no requirement to assess the liquidated demand where the suit proceeded in default of a written statement of defence by the Defendants. Where an order is made and the Defendant is aggrieved the grounds for setting aside the judgment on a liquidated demand are the same as those for assessed damages and is whether there is sufficient cause to set aside the ex parte proceedings and judgment.

Order 9 rule 8 of the Civil Procedure Rules is the rule for assessment of pecuniary damages. The head note of Order 9 rule 8 of the Civil Procedure Rules reads as follows: "Assessment of damages." Secondly Order 9 rules 8 if quoted in full for ease of reference and it provides that:

"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the Defendant fails or all Defendants, if more than one, fail to file a defence on or before the day fixed in the summons, the Plaintiff may, subject to rule 5 of this Order, enter an interlocutory judgment against the Defendant or Defendants and set down the suit for assessment by the court of the value of the goods and damages or the damages only, as the case may be, in respect of the amount found to be due in the course of the assessment."

A liquidated demand is a sum certain in money (See **Uganda Baati vs. Patrick Kalema High Court, Commercial Division, Civil Suit Number 126 of 2010** and adopting the definition in **Stroud's Judicial Dictionary** that: "liquidated demand" inter alia means and includes, the amount on a bill of exchange, definite interest on a contract or under a statute, a sum certain in

money, a statutory demand for the payment of a total debt and an amount due on a judgment). The definition is consistent with that for a claim under summary procedure under Order 36 rule 2 of the Civil Procedure Rules. On the other hand, “pecuniary damages” are defined by **Halsbury’s Laws of England 4th Edition Volume 12 (1) Paragraph 809** to mean any financial disadvantage past or future, whether precisely calculable or not. “Past loss of earnings and an assessment of loss of earnings, loss due to damage to a chattel, loss on breach of a contract for the sale of goods, and loss of profits constitute pecuniary damage”. Non pecuniary damage refers to claims for “pain, suffering, damage to reputation and interference with the enjoyment of property”.

The Plaintiffs’ claim is for pecuniary damages for detention of goods and for compensation for withholding of money by the Defendant as averred in the pleadings. The matter is even deeper than a claim for pecuniary damages per se. Under Order 8 rule 8, in a claim for detention of goods, an order for release of the goods does not require assessment for damages. The assessment of damages relates to the alleged pecuniary loss due to the alleged unlawful detention of goods.

For the liquidated demand where interlocutory judgment is entered the Plaintiff is entitled to damages for the amount pleaded under Order 9 rule 6 together with the interest pleaded. This is because Order 9 rule 6 provides as follows:

“Where the plaint is drawn claiming a liquidated demand and the Defendant fails to file a defence, the court may, subject to rule 5 of this Order, pass judgment for any sum not exceeding the sum claimed in the plaint together with interest at the rate specified, if any, or if no rate is specified, at the rate of 8% per year to the date of judgment and costs.”

There is a claim for a liquidated demand together with a claim for interest at the rate specified. The Plaintiffs are entitled to the various amounts claimed if no evidence was led on the same claim for purposes of proof. The entitlement arises from the plaint and the rule. It is assumed that the Defendant, who does not file a defence, admits the claim as provided for under Order 8 rules 3 of the Civil Procedure Rules. This rule provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the

opposite party, shall be taken to be admitted, except as against the person under disability. For judicial precedent, that is the case of **Abbey Panel & Sheet Metal Co Ltd vs. Barson Products (a firm) [1947] 2 All ER 809** and judgment of Somervell LJ at page 809 held that:

“...where a Plaintiff is claiming pecuniary damages plus a liquidated demand and does not exercise his right to sign final judgment in respect of the latter, but signs an interlocutory judgment in respect of the whole claim, I do not think the Defendant can claim to have the final judgment which is subsequently given set aside as irregular. Under the rules, the Plaintiffs are entitled to final judgment against the Defendants in respect of the liquidated demand covered ex hypothesi by the final judgment.”

Similarly, Evershed LJ at page 810 held that the intended scope and purpose of the rules (*In pari materia*) are reasonably plain:

“They provide that where a Plaintiff has in his writ made a claim against a Defendant for one or more of the following, viz, (a) a debt or liquidated demand, (b) detinue, and (c) pecuniary damages, and such Defendant, though properly served, does not choose to appear to the writ, then the Plaintiff may, without having to take any further steps against that Defendant, obtain judgment against him for his claim—in the case of a liquidated demand, a final judgment; in the other cases, an interlocutory judgment subject to assessment by the court of the monetary amount he is entitled to recover.”

I followed the authority in several other judgments and I do so again in this suit. The Plaintiffs are entitled to judgment on the liquidated amount together with the interest claimed in the plaint. The first Plaintiff is entitled to Uganda shillings 11,050,000/- (eleven million and fifty thousand only) against the first Defendant and the said amount is accordingly awarded for the first Plaintiff against the first Defendant.

Secondly, the first Plaintiff is entitled to an order for release of its goods, in the custody of the second Defendant as pleaded. An order is issued for the second Defendant to immediately release the first Plaintiff's goods in its custody.

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Similarly the second Plaintiff is entitled to judgment for the liquidated amount together with the interest claimed in the plaint. The second Plaintiff is entitled to Uganda shillings 152,297,575/- (One Hundred Fifty Two Million, Two hundred Ninety Seven Thousand, Five Hundred Seventy Five) against the first Defendant and the said amount is accordingly awarded for the second Plaintiff against the first Defendant.

Thirdly, the second Plaintiff is entitled to an order for release of its goods in the joint custody of the first and second Defendants as pleaded in paragraph 6 of the plaint. An order is issued for the first and second Defendants to immediately release the second Plaintiff's goods in their custody.

The first and second Defendants are entitled to interest at court rate from the date of judgment till payment in full under Order 9 rules 6 of the Civil Procedure Rules on the liquidated amount.

With regard to the claim for general damages, the Plaintiff's Counsel submitted that the Plaintiff is entitled to general damages to be assessed at a rate of interest for money withheld. In other words the Plaintiff submitted under the principle that the purpose for the award of interest would be *restitutio in integrum* which should be a rate that is reasonable for award as general damages. I agree with the submissions under the principle that the rationale for the award of general damages is *restitutio in integrum*. Similarly the rationale for awarding reasonable interest, in disputes of a commercial nature for money withheld, is the principle of *restitutio in integrum*. I have consistently followed the holding of Forbes J in **Tate & Lyle Food and Distribution Ltd vs. Greater London Council and another [1981] 3 All ER 716** at page 722 that interest is not awarded against a Defendant as a punitive measure for having kept the Plaintiff out of his money but as part of an attempt to achieve *restitutio in integrum*. In commercial cases interest should reflect the rate at which the Plaintiff would have had to borrow money to supply in place of that which was withheld (See Lord Wright of the House of Lords in **Riches vs. Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472**, that an award of interest is compensation and maybe "...regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation...")

In this case there is no need to award reasonable interest and what should be considered is whether the contractual rate of interest should be awarded.

In this suit the Plaintiff sought interest at the contractual rate of 5% per month for the first Plaintiff and the 2% per month for the second Plaintiff. There is no need for the court to assess other interest rates.

In **Halsbury's laws of England fourth edition reissue volume 12** (1) and paragraph 1063 thereof the rate of damages for breach of contract to pay money due, is normally limited to the amount of the debt together with such interests from the time when it became payable under the contract or as the court may allow. Where the contract has interest as a genuine pre-estimate of damage, interest will be paid at the agreed rate. In other words the agreed rate of interest agreed is the measure of agreed damages and nothing more. Again it is written in **Halsbury's laws of England fourth edition reissue volume 12 (1) paragraph 1065** at page 486 that:

"The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach, then it represents the agreed damages, called liquidated damages, and it is recoverable without the necessity of proving the actual loss suffered."

In the case of **Suisse Atlantique Société D'armement Maritime S A vs. N V Rotterdamsche Kolen Centrale [1966] 2 All ER 61** (House of Lords), Viscount Dilhorne held at page 69 that:

"Here the parties agreed that demurrage at a daily rate should be paid in respect of the detention of the vessel and, on proof of breach of the charter party by detention, the appellants are entitled to the demurrage payments without having to prove the loss which they suffered in consequence. In my view, the appellants cannot avoid the operation of these provisions and cannot recover more than the agreed damages for the detention of their vessel..."

The contractual clause is enforceable irrespective of the adequacy of the amounts stipulated in the contract and the Plaintiff cannot claim for more than is catered for in the contract. Lord Reid on the issue held at page 77 of the judgment that:

“The appellants chose to agree to what they now say was an inadequate sum for demurrage, but that does not appear to me to affect the construction of this clause. Even if one assumes that the \$1,000 per day was inadequate and was known to both parties to be inadequate when the contract was made, I do not think that it can be said that giving to the clause its natural meaning could lead to an absurdity or could defeat the main object of the contract or could for any other reason justify cutting down its scope. If there was a fundamental breach, the appellants elected that the contract should continue, and they did so in the knowledge that this clause would continue.”

As far as the first Plaintiff is concerned the rate of interest in the contract between the first Plaintiff and the first Defendant is 5% per month on cheques returned unpaid under paragraph H of the trading terms and conditions. In case of delayed payments under Paragraph I the rate of interest is still 5% per month on the delayed amount. Interest is for 26 months and the first Plaintiff claims interest of Uganda shillings 14,365,000/=

As far as the second Plaintiff is concerned, the rate of interest provided for in the contract between the second Plaintiff and the first Plaintiff is interest at prevailing market rates for overdue payments under paragraph 1 of the terms and conditions duly endorsed by the first Defendant. PW2 prayed for interest at the rate of 2% per month and claimed a sum of Uganda shillings 79,194,739/= for a period of 26 months.

Following the clear principle in the above precedents that damages are recoverable for delay in payment under a contract which provides for the consequence of delay is the specified amount stipulated in the contract. The only question I have is whether 5% per month is a genuine pre-estimate of damage. It is 60% per annum. The rate of the second Plaintiff on the other hand is 24% per annum and is reasonable.

Commercial rates have ranged from 18% - 25% per annum in the recent past.

In the premises the second Plaintiff is awarded Uganda shillings 79,194,739/= on the liquidated demand as agreed and contractual damages. Similarly the first Plaintiff is awarded a sum of Uganda shillings 5,746,000/= as damages under this head for withholding of money. This represents an interest rate of 2% per month for 26 months on the liquidated damages awarded.

Aggravated damages:

Exemplary damages are defined by **Osborn's Concise Law Dictionary** as damages awarded in relation to certain tortuous acts (such as defamation, intimidation and trespass) but not for breach of contract. In contrast to aggravated damages which are compensatory in nature, such damages carry a punitive aim at both retribution and deterrence for the wrongdoer and others who might be considering the same or similar conduct. Exemplary damages was considered by the Court of Appeal sitting at Nairobi in the case of **Obongo and another vs. Municipal Council of Kisumu [1971] 1 EA 91** per Spry VP at page 94 as being awarded for torts such as:

“... oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the Defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff. As regards the actual award, the Plaintiff must have suffered as a result of the punishable behaviour; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the Defendant’s conduct is to be taken into account. It will be seen that the House took the firm view that exemplary damages are penal, not consolatory as had sometimes been suggested”.

According to **Halsbury's laws of England fourth edition volume 12 paragraph 811**, aggravated damages may be awarded. "In certain circumstances the court may award more than nominal measure of damages, by taking into account the Defendant's motives or conduct and such damages may be either aggravated damages which are compensatory in that they compensate the victim of a wrong for mental distress, or injury to feelings, in circumstances in which the injury has been caused or increased by the manner in which the Defendant committed the wrong." Furthermore under paragraph 1114, aggravated damages in tort are where damages

are "at large". This means that they are not limited to the pecuniary loss that can be specifically proved. In such cases the court may take into account the Defendant's motives, conduct and manner of committing the tort, and where these have aggravated the Plaintiff's damages by injuring his proper feelings of dignity, and pride, aggravated damages maybe awarded. The Defendant may have acted with malevolence or spite or behaved in a high-handed, malicious, insulting or aggressive manner.

I find no basis for awarding the Plaintiffs aggravated or exemplary damages. There is simply no evidence of arbitrary or unconstitutional behaviour or malevolence or spite towards the Plaintiff or malicious and high handed behaviour.

Regarding interest on damages, I award interest at the rate of 12% per annum on the general damages from the date of judgment till payment in full.

The Plaintiff's suit succeeds with costs of the suit.

Judgment delivered in open court on the 6th of September 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Fidelis Otwa holding brief for Deepa Verma Counsel for the Plaintiff

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

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